

Waweru (Migration) [2019] AATA 6371 (28 November 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Mr Michael Mutitu Waweru
CASE NUMBER: 1821572
HOME AFFAIRS REFERENCE(S): BCC2017/219112
MEMBER: Steven Griffiths
DATE: 28 November 2019
PLACE OF DECISION: Adelaide
DECISION:

1. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations
- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations
- r.2.03A

Statement made on 28 November 2019 at 9:03am

2. CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Spouse) – not holder of substantive visa at time of application – Criterion 3001 not met – compelling reason for waiver – applicant provides emotional, physical and financial support to sponsor – emotional hardship and risk to physical health of sponsor if separated from applicant for extended period – evidence parties are de facto partners provided – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5, 65
Migration Regulations 1994 (Cth), r 1.09, Schedule 2, cls 820.211, 820.221, Schedule 3, Criterion 3001*

CASES

Babicci v MIMIA (2005) 141 FCR 285

He v MIBP [2017] FCAFC 206

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 13 January 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the visa applicant was the de facto partner, as defined in s.5CB of the Act, of the sponsor.
6. The Tribunal determined from the documented evidence that the visa applicant was no longer the holder of a substantive visa at the time of the visa application and resolved that a decision on cl.820.211(2)(d)(ii) compelling reasons was required.
7. The applicant appeared before the Tribunal on 18 October 2019 to give evidence, respond to questions and present arguments. The Tribunal also received oral evidence from the sponsor and by telephone from H Flanigan and K Duggan. Additional evidence need was identified, as was the possibility of a resumed hearing. When the additional evidence was reviewed, the Tribunal confirmed to the parties that sufficient evidence was available for a decision to be made and another hearing was not required.
8. The applicant was represented by his migration agent at the hearing by telephone.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

10. BACKGROUND OF THE EVIDENCE

11. Mr. Waweru was born in Nairobi, Kenya, in 1982. His parents, born 1957 & 1960, and two brothers and sister, born 1988, 1996 & 2002, all live in Kenya. He came to Australia on 8 January 2014 on a student visa expiring on 30/9/15, which was extended to 30/9/16, and he was on a bridging visa when he lodged a partner visa application on 13/1/17.
12. Ms. Alver was born in Adelaide, Australia, in 1963. Her parents and brother are deceased. She has been married and divorced twice, and has a daughter, born June 1993.

13. INFORMATION TO THE TRIBUNAL

14. Since the Department of Immigration made its decision, the applicant has provided further information to the Tribunal including:-
 15. Migration Agent submission
 16. Form 888 Statement, H Flanigan, cousin of sponsor, 7/5/19
 17. Form 888 Statement, H Houston, friend of sponsor, 18/1/17 & 27/5/19

18. Form 888 Statement, B Gibson, solicitor of applicant, 8/10/19
19. Statutory Declaration, D Willis, cousin of sponsor, 22/9/19
20. Form 888 Statement, P Nsimba, friend of applicant, 18/1/17
21. Form 888 Statement, K Duggan, friend of sponsor, 13/5/19
22. Form 888 Statement, G Houghton, friend of sponsor, 28/5/19
23. Residential Tenancy Agreement, 18/1/19
24. D Burrell, Grace Ministries Adelaide, letter of support, 15/6/15 & 20/2/16
25. Car Registration & Licensing, applicant name
26. ASX correspondence, applicant name
27. CarmenaLegal, applicant name
28. Residential Tenancy Agreement, 21/7/17
29. Relationship Statement, by sponsor, 7/10/19
30. Gas account, sponsor name, 10/5/18
31. Australian Marketing Institute, applicant name
32. Payroll slips, applicant, 15/4/18
33. Statutory Declaration, applicant, pooling of finances, 29 examples, 1/10/19, total \$ 11,495.33
34. Commonwealth Bank, joint names account, 18/3/19 to 1/10/19
35. Statement J and T Savage, friends of sponsor, 25/1/17
36. Sponsor superannuation account, applicant 100% beneficiary
37. Sponsor Certificate of Divorce from 2nd Husband, 2006
38. Sponsor Certificate of Divorce from 1st Husband, 1992
39. Form 80, Sponsor Character Assessment, 1/10/19
40. Statutory Declaration, Sponsor, 27/9/19
41. 31 examples of dining out – payment receipts
42. Car registration, both names, 11/1/18
43. Water payments, via Real Estate agreement, 31/5/19 & 8/7/19
44. Budget for parties, July 2019
45. Applicant University of SA study confirmation, 26/9/16

- 46. Applicant TAFE SA 16/8/19
- 47. WhatsApp chat history, 256 Pages, November 2017 to June 2019
- 48. Relationship statement by applicant, 3/10/19
- 49. Pooling of funds between parties, some duplicated
- 50. 17 photos of the parties with family and friends, 2017 to 2019
- 51. Relationship Registration, 24/4/19
- 52. Text messages, 2/5/18 to 5/5/18 & 1 for 15/11/18
- Applicant Commonwealth Bank statement, January to July 2019
- Kurralta Park Surgery, Dr. Patel, GP to sponsor, 29/10/19
- LJ Hooker, water accounts for rental property, joint names, 10/10/19
- Sponsor Commonwealth Bank statement, March to October 2019
- Rental Agreement extension, joint names, 30/10/19

CONSIDERATION OF CLAIMS AND EVIDENCE

- 53. The issue in the present case is whether the applicant meets Schedule 3 criteria, and if he does not meet the criteria, whether there are compelling reasons for not applying the criteria. If compelling reasons exist, the issue then becomes is the applicant the de facto partner, as defined by s.5CB of the Act, of the sponsor.
- 54. The Tribunal has taken into consideration all the evidence in the Department of Immigration file, the Tribunal file and the evidence provided to the hearings.

Does the applicant meet Schedule 3 criteria, or should the criteria be waived?

- 55. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d)(ii).
- 56. It is not in dispute that the applicant did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

- 57. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
- 58. In order to meet Schedule 3 Criterion 3001, the application must have been validly made within 28 days after the relevant day. For the purpose of this application, the last relevant

day is the last day the applicant held a substantive visa. The applicant lodged his application on 13 January 2017 and his last substantive visa ceased on 30 September 2016.

59. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

60. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
61. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
62. The applicant presented documented and oral evidence of his relationship with the sponsor, with the relationship commencing in May 2015 and commencing living together in November 2016. The Tribunal acknowledges the applicant's claims and has considered the various documents he has provided in support of the claim that the relationship is a genuine one. However, the Tribunal makes no assessment as to the nature of the applicant's relationship at this stage with the sponsor and has accepted at face value the claims made by the parties that they were and continue to be in a genuine relationship together and the circumstances of that relationship for the purposes of this decision.
63. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.
64. The Tribunal is mindful that the Explanatory Statement to Migration Regulations (Amendment) 1996 No. 75, in providing examples of compelling reasons, states:
- Where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer... In these circumstances, waiver **may** be justified by the hardship which could result if the Schedule 3 criteria were not waived (Tribunal's emphasis).
65. The explanatory statement and any guidelines produced by the Department do not provide criteria which, if met, satisfy the requirements of the legislation. If the nature of the relationship between the applicant and the sponsor were to be a compelling reason for not applying the Schedule 3 criteria, all the factors of the relationship, including its duration, the level of financial and emotional commitment, the dependence the parties had upon each other and other relevant factors must be considered. As it is made clear in the Explanatory

Statement, the examples provided only may justify the waiver of the Schedule 3 criteria. They do not provide a criterion that, if satisfied, becomes a compelling reason for not applying the Schedule 3 criteria and the Explanatory Statement is not part of the statutory text which is to be considered.

66. The Tribunal accepts that the relationship of the parties commenced 16 months before the substantive visa of the applicant ceased, while noting the sponsor has for much of her adult life been in poor relationships which has left her untrusting of people, dependent upon alcohol and dealing with mental health issues, and considers the length of relationship to assist in supporting a compelling reason for the waiver.
67. The Tribunal accepts that at the time of the substantive visa of the applicant ceasing, he was supporting the sponsor who as a result of workplace issues spent 3 weeks in bed while dealing with severe mental health problems exacerbated by consuming alcohol and considers this to support a compelling reason for the waiver.
68. The Tribunal accepts the mental health and relationship issues with her daughter, emanating from the second marriage of the sponsor, noting that she was divorced by her husband in 2006, have impacted on her life significantly for over a decade, resulting in lengthy periods of unemployment and disassociation, by her choice, from family and friends and considers this to support a compelling reason for the waiver.
69. The Tribunal accepts the documented and oral evidence of family and friends on the positive influence the applicant has had to the quality of life of the sponsor and considers this to support a compelling reason for the waiver.
70. The Tribunal accepts the documented and oral evidence consistently enforcing the positive influence of the applicant in the life of the sponsor over the last 4 years, with the oral evidence provided by a cousin and a long term friend noting the applicant is recognised by them, and the siblings of the cousin and other friends, as being so important to the wellbeing of the sponsor that if the applicant is required to leave Australia they are concerned about the future of the sponsor holds, and considers this to support a compelling reason for the waiver.
71. The Tribunal, from the oral evidence of the parties and a review of cultural issues, accepts that the applicant has been, and remains, a significant supporter of the sponsor in all areas of her health and emotional well-being needs and has devoted all of his non-working hours to the sponsor, and considers the probable outcomes impacting on the sponsor of a separation of the parties to support a compelling reason for the waiver.
72. The Tribunal accepts the documented evidence of Dr. Patel, the treating doctor of the sponsor, of May 2018 and October 2019, of the medical history of the sponsor and the confirmation of the important role undertaken by the applicant to support the physical and mental health of the sponsor to support a compelling reason for the waiver.
73. The Tribunal accepts that it is reasonable to expect a level of emotional hardship and significant risk to the physical health of the sponsor to be experienced if the applicant is separated from the sponsor for any extended period of time. The Tribunal acknowledges that this is a common experience for other people who apply to migrate to Australia from offshore on the basis of their relationship with an Australian citizen or permanent resident. The Tribunal accepts that emotional hardship can be considered a compelling reason for not applying Schedule 3 criteria and the Tribunal determines that the evidence presented by the applicant and the sponsor is sufficient to substantiate the impact of emotional hardship.

74. On evidence the Tribunal is satisfied there are compelling reasons for not applying Schedule 3 criteria as the applicant provides emotional, physical and financial support to his sponsor in Australia and this would be significantly impacted if he was required to leave Australia, develop an income stream, lodge an offshore partner visa application and await a decision.

Is the sponsor an Australia citizen, and Australian permanent resident or an eligible New Zealand citizen?

75. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian Permanent Resident or an eligible New Zealand citizen. The Tribunal accepts that the sponsor is an Australian citizen by birth.

Are the parties in a de facto relationship?

76. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
77. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

CLAIMS AND FINDINGS

Financial aspects of the relationship that must be considered include:-

- (i) *any joint ownership of real estate or other major assets; and*
 - (ii) *any joint liabilities; and*
 - (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) *whether one person in the relationship owes any legal obligation in respect of the other; and*
 - (v) *the basis of any sharing of day-to-day household expense*
78. The Tribunal determines from the oral evidence of the parties that at the time of the visa application and this decision, no real estate was or is jointly owned by the parties.
79. The Tribunal determines from the documented and oral evidence of the parties that at the time of the visa application and this decision, the parties do not have any joint liabilities.
80. The Tribunal determines from the oral evidence of the parties that at the time of the visa application and this decision, none of the parties has a legal obligation with regard to the other.
81. The Tribunal accepts the documented and oral evidence of the applicant working in the mining industry on a two week remote and one week home roster.
82. The Tribunal accepts the documented and oral evidence of the sponsor working in the mining industry on a two week remote and one week home roster.

83. The Tribunal accepts the documented and oral evidence, confirmed independently by the parties, of the joint bank account operated to which both parties deposit funds to pay for significant commitments such as home rent, household and entertainment costs, and determines, at the time of application and this decision, this account confirms the pooling of financial resources in relation to major financial commitments and the sharing of day-to-day household costs.
84. The Tribunal accepts the documented and oral evidence of the parties, confirmed independently, of each retaining a personal bank account in to which income is deposited and from which they transfer funds to the joint bank account as required and determines, at the time of application and this decision, the transfers to the joint account to represent the pooling of financial resources and the sharing of day-to-day household expenses.
85. *Nature of the household aspects that must be considered include:-*
- (i) any joint responsibility for the care and support of children; and*
 - (ii) the living arrangements of the persons; and*
 - (iii) any sharing of the responsibility for housework*
86. The Tribunal accepts the documented and oral evidence from the parties of the sponsor have an adult daughter, from her second marriage and who lives with her father, from who the sponsor is estranged, with the applicant not having children, and determines at the time of the application and this decision the parties do not have any joint responsibility for the care and support of children.
87. The Tribunal accepts the oral evidence of the parties, confirmed independently, of the encouragement provided by the applicant for the sponsor to be in contact with her daughter.
88. The Tribunal accepts the documented and oral evidence, confirmed independently, of the parties living together since November 2016 and determines, at the time of application and this decision, the parties live together when their work schedules, which require them to work in remote areas (South Australia for the applicant and Queensland for the sponsor) have been aligned for the last 3 months, allow.
89. The Tribunal accepts the documented and oral evidence of parties sharing their rented home with a cousin of the sponsor, who works locally and lives in the home at all times.
90. The Tribunal accepts the oral evidence, confirmed by the parties independently, on the roles each undertakes in the household, and determines, at the time of application and this decision, the parties share the responsibility for housework.
91. *Social aspects of the relationship that must be considered include:-*
- (i) whether the persons represent themselves to other people as being a de facto partner to each other; and*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities*
92. The Tribunal accepts the photographic, documented and oral evidence and determines, at the time of application and this decision, the parties represent themselves to other people as being de facto partners.
93. The Tribunal accepts the documented, photographic and oral evidence of family and friends of the parties and determines, at the time of application and this decision, the opinion of family, friends and acquaintances as being supportive of the de facto relationship.

94. The Tribunal accepts the documented and oral evidence of the contact between the parties when apart due to work schedules, and determines, at the time of application and this decision, the parties have a good knowledge of what the other does.
95. The Tribunal accepts the photographic, documented and oral evidence, confirmed by the parties independently, while acknowledging the work schedule of the applicant and sponsor, determines at the time of application and this decision, the parties plan and undertake joint social activities.
- 96.
97. *Nature of the commitment to each other that must be considered include:-*
- (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) whether the persons see the relationship as a long-term one.*
98. The Tribunal accepts the evidence of the parties making contact via a dating website in April 2015, meeting on 4 May 2015, becoming de facto partners on 29 May 2015 and the applicant staying overnight with the sponsor often 3 nights per week until moving into the home of the sponsor in November 2016.
99. The Tribunal accepts the photographic, documented and oral evidence that the parties have lived together since November 2016.
100. The Tribunal accepts the documented and oral evidence of the parties of the issues they have dealt with and the support provided to each other in getting through these issues and determines, at the time of application and this decision, a high level of companionship and emotional support is provided by each of the parties.
101. The Tribunal accepts the oral evidence of the parties, confirmed independently, of marriage having been discussed, with the sponsor, who has been married twice, holding the position that signing a piece of paper is not required for a commitment to a relationship to exist.
102. The Tribunal accepts the oral evidence of the parties and determines, at the time of application and this decision, they have had and continue to have an ongoing commitment to each other and see the relationship and de facto partnership as being long-term.
103. *Any other circumstances in the relationship*
104. The Tribunal accepts the mental health and relationship issues of the sponsor for over a decade have impacted heavily on her, resulting in lengthy periods of unemployment and disassociation, by her choice, from family and friends and notes the consistent documented and oral evidence of the positive impact made by the applicant to the life of the sponsor.
105. *Whether the parties are related by family*
106. The Tribunal was determines that the parties are not related by family.
107. The Tribunal considered all the evidence on the circumstances of the parties and determines that the evidence supports a finding that, at the time of the application and this decision, the parties have had and continue to have a mutual commitment to a shared life together as a de facto couple to the exclusion of all others, with the relationship genuine and continuing and they had and continue to live together.

108. The Tribunal accepts that the parties have been in a committed relationship since mid-2015 and do not live separately and apart of a permanent basis.

109. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of the visa application and the time of this decision. The Tribunal is further satisfied the sponsor is not prohibited by subclause (2B) from being a sponsoring partner.

110. The applicant therefore meets cl.820.211(2)(a). The Tribunal accepts the applicant was sponsored and therefore meets cl.820.211(2)(c). Accordingly, the applicant meets cl.820.211(2). The applicant continues to meet these requirements at the time of decision and therefore meets cl.820.221(1).

Are the additional criteria for a de facto relationship met?

111. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.

112. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.

113. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. The Tribunal accepts that the parties have been in a relationship since mid-2015. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.

114. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

115. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

116. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations.
- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations
- r.2.03A

- Member

Steven Griffiths

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).